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September 16, 2005

RECEIVED  
2005 SEP 16 PM 3:03  
SC PUBLIC SERVICE  
COMMISSION

Mr. Charles Terreni  
Chief Clerk of the Commission  
Public Service Commission of South Carolina  
Post Office Drawer 11649  
Columbia, South Carolina 29211

Re: Joint Petition for Arbitration of NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius [Affiliates] an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended  
Docket No. 2005-57-C

Dear Mr. Terreni:

Enclosed for filing are an original and ten copies of BellSouth Telecommunications, Inc.'s Motion to Overrule Hearing Officer's Order in the above-referenced matter.

By copy of this letter, I am serving all parties of record with a copy of this motion as indicated on the attached Certificate of Service.

Sincerely,

A handwritten signature in black ink that reads "Patrick W. Turner". The signature is fluid and cursive, with a long horizontal stroke at the end.

Patrick W. Turner

PWT/nml  
Enclosures  
cc: All Parties of Record  
DM5 # 602120

**BEFORE THE  
PUBLIC SERVICE COMMISSION  
OF SOUTH CAROLINA**

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2005 SEP 16 PM 3:03  
SC PUBLIC SERVICE  
COMMISSION

In the Matter of )

Joint Petition for Arbitration of )

NewSouth Communications Corp., )

NuVox Communications, Inc. )

KMC Telecom V, Inc., KMC Telecom III LLC, and )

Xspedius Communications, LLC on Behalf of its )

Operating Subsidiaries Xspedius Management Co. )

Switched Services, LLC, Xspedius Management Co. )

Of Charleston, LLC, Xspedius Management )

Co. of Columbia, LLC, Xspedius Management Co. )

Of Greenville, LLC, and Xspedius Management Co. )

Of Spartanburg, LLC )

Of an Interconnection Agreement with )

BellSouth Telecommunications, Inc. )

Pursuant to Section 252(b) of the )

Communications Act of 1934, as Amended )

Docket No. 2005-57-C

**MOTION TO OVERRULE HEARING OFFICER'S ORDER**

For the reasons set forth below, BellSouth Telecommunications, Inc. ("BellSouth") respectfully requests the Public Service Commission of South Carolina ("the Commission") to overrule the Hearing Officer's Order of September 9, 2005.<sup>1</sup> BellSouth further requests an opportunity to present argument regarding this Motion to the Commission.

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<sup>1</sup> Order, *In Re: Joint Petition of Arbitration*, Order No. 2005-494 in Docket No. 2005-57-C (September 9, 2005). Pursuant to Section 58-3-40 of the South Carolina Code, the "hearing officer has full authority, subject to being overruled by the commission, to rule on questions concerning the conduct of the case and the admission of evidence . . . ." (Emphasis added).

## INTRODUCTION

The issues that are the subject of this Motion arose when BellSouth discovered that Hamilton Russell, III was both an in-house lawyer for NuVox and a member of a law firm that represents BellSouth when he advocated legal and policy positions for NuVox and against BellSouth during the hearing in this docket. BellSouth was not aware of Mr. Russell's dual employment at the time of the hearing. When BellSouth discovered this fact after the hearing, it filed a motion to strike Mr. Russell's testimony on the grounds that an attorney cannot advocate legal and policy positions for one client of his firm (NuVox) and against another client of his firm (BellSouth).

Mr. Russell is no longer an in-house lawyer for NuVox, but he continues to be a member of a law firm that represents BellSouth. The concern that leads BellSouth to file this motion is clear and simple – an attorney in a firm that represents BellSouth (or any other party) should not be allowed to also represent the other side, either by arguing legal and policy positions from counsel table or by arguing the same legal and policy positions from the witness stand (which is what the Joint Petitioners seek to have Mr. Russell do). BellSouth is unwilling to waive its rights and voluntarily allow that to happen, and BellSouth will continue to take all appropriate steps to protect its rights to insist that this does not happen in this proceeding.

In order to protect those rights, BellSouth respectfully files this Motion to overrule the Hearing Officer's Order. Significantly, this is not a petition to reconsider a decision that the Commission already has reached after carefully considering all of the evidence and legal authority. Instead, this is a Motion to have the Commission consider

these matters for the first time. Accordingly, BellSouth respectfully requests an opportunity to present oral argument regarding this Motion to the Commission.

### **GROUND FOR MOTION**

As grounds for BellSouth's Motion to overrule the Order, BellSouth would show the following:

**1. Mr. Russell's standing to withdraw his own testimony.**

The Order should be overruled because it erroneously finds that Mr. Russell has no standing to request withdrawal of his own pre-filed testimony.<sup>2</sup> BellSouth cannot envision any circumstances under which the Joint Petitioners have a legal right to force a particular attorney to involuntarily advocate legal and policy positions on their behalf in a Commission proceeding, especially when doing so would be (or even arguably would be) a conflict of interest between the attorney and another party. BellSouth, therefore, respectfully submits that the Order is in error in ruling that an attorney faced with such an actual (or even a potential) conflict of interest has no standing or ability to eliminate the conflict (or even the appearance of a conflict) by withdrawing his own pre-filed testimony.<sup>3</sup> BellSouth further submits that the Order is in error in ruling that Mr. Russell lacks standing to withdraw his own testimony when the filing of that testimony is "inconsistent with [his] firm's previous undertaking with the parties."<sup>4</sup> BellSouth, therefore, respectfully submits that the Commission should overrule the Order and accept

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<sup>2</sup> See Order at 4-5.

<sup>3</sup> This is not a situation in which legal and policy positions have been advocated before the Commission, are part of the record in a proceeding, and are then asked to be withdrawn from the record by the person that advocated those positions. To the contrary, the advocacy that Mr. Russell previously presented has been stricken from the record in an unchallenged Order. See Order Granting Motion to Strike Testimony, Order No. 2005-387 in Docket No. 2005-57-C (July 20, 2005).

<sup>4</sup> See Letter to Charles Terreni from Hamilton Russell dated August 11, 2005.

Mr. Russell's withdrawal of his testimony, which would eliminate even the appearance of a conflict of interest.

**2. The Merits of Any Specific Objection to the Testimony.**

BellSouth does not believe the Hearing Officers' Order ruled on the merits of any specific objection BellSouth may make regarding the testimony that is the subject of the Order (including without limitation objections on the grounds that it would be a conflict of interest for Mr. Hamilton to present that testimony). Instead, BellSouth understands the Hearing Officer's Order to allow BellSouth to: appear at a hearing in which the Joint Petitioners may attempt to submit Mr. Russell's testimony into the record; and raise any objections it may have to the submission of that testimony, upon which the Commission will "make such rulings as necessary."<sup>5</sup> To the extent the Commission has the same understanding of the Order, BellSouth is not asking the Commission to overrule this aspect of the Order.

However, to the extent that the Commission views the Order as ruling on the merits of any specific objection BellSouth may make regarding the Russell testimony, BellSouth requests that the Commission overrule the Order. Specifically with regard to the conflict of interest issue, BellSouth's submissions in this docket clearly show that whether an attorney advocates legal and policy positions from the witness stand or from counsel's table, that attorney is representing a party, and the conflict of interest prohibitions apply equally in either case.<sup>6</sup> The Joint Petitioners' unfortunate decision to

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<sup>5</sup> Order at 6.

<sup>6</sup> BellSouth's positions on this issue are set forth in detail in documents on file with the Commission in this docket, including without limitation: BellSouth's Motion to Strike All Testimony Presented by Mr. Hamilton Russell, III; BellSouth's Memorandum in Reply to Joint Petitioners' Response to BellSouth's Motion to Strike; Transcript of Oral Argument of June 29, 2005; BellSouth's Objection to Joint Petitioners'

characterize BellSouth's position on the issue with terms such as "false assertion," "false premise," and "false pretense"<sup>7</sup> neither hides nor alters the fact that the overwhelming weight of authority supports BellSouth position that a conflict would, in fact, exist if the Joint Petitioners were allowed to force Mr. Russell to do what he has said he will not do voluntarily.

### **3. Remedies Proposed by BellSouth.**

BellSouth respectfully requests that the Commission overrule the Order's decision not to adopt one of the two remedies proposed by BellSouth. Specifically, Joint Petitioners have been given ample opportunity to pre-file testimony of a witness who is willing to voluntarily appear before the Commission at a hearing and who has no conflict of interest. They have repeatedly refused to avail themselves of any of these opportunities. Throughout the course of this nine-state arbitration proceeding, the Joint Petitioners have periodically chosen to have certain witnesses adopt the testimony of other witnesses. The Joint Petitioners' refusal to do so in this instance, despite an unchallenged Order striking Mr. Russell's testimony, should not be rewarded or condoned. BellSouth, therefore, respectfully requests that the Commission close these proceedings and order the parties to submit post-hearing briefs on the basis of the record that now exists as a result of the Order Granting Motion to Strike Testimony.

This approach is both appropriate and warranted. If, however, the Commission would prefer to consider an alternative approach to finalizing the record of this proceeding, BellSouth respectfully suggests that the Commission order the parties to file the testimony the Joint Petitioners' new witness presented in the Mississippi arbitration

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Request; and BellSouth's Letter to Charles Terreni dated August 26, 2005. These documents are incorporated into this Motion by reference.


<sup>7</sup> Joint Petitioners' Letter to Charles Terreni dated August 23, 2005.

hearing (including the testimony presented during cross-examination). This approach would place into the record the testimony that the Joint Petitioners have chosen to present to another state Commission on the issues that are now before this Commission. The Joint Petitioners hardly can be heard to complain about such a decision when they acknowledge that their decision to use the new witness in Mississippi was made entirely of their own volition and was “not based on the ‘conflict of interest’ asserted by BellSouth.”<sup>8</sup> This approach also would eliminate the need for any further evidentiary proceedings in this docket and would allow the Commission to receive briefs and rule on the merits of the arbitration issues.

### CONCLUSION

BellSouth respectfully requests that the Commission hear argument on this Motion and Overrule the Hearing Officer’s Order as set forth above.

BELLSOUTH TELECOMMUNICATIONS, INC.



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602116

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<sup>8</sup>

*Id.* at p.2, n.1.





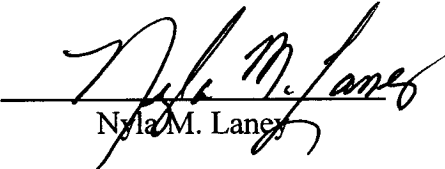
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